IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

A.O.NO 364 OF 2004

Sunil Keshav Kadlar .. Appellant
(Org. Plaintiff)

vs.

Mrs.Sunanda Jairam Patil .. Respondent.
(Org. Defendant)

Shri R.V.Govilkar, Advocate for the Appellant.

Shri Anil Singh i/b. Shri D.R.Shah, Advocate for the Respondent.

CORAM : A.S.OKA, J.

DATED : 29th March, 2005.

P.C. :

1. Admit.

2. Respondent waives service. The Appeal is preferred by the Original Plaintiff. The suit filed by the Plaintiff was dismissed for default on 1.4.2003 at the stage of recording of evidence. A notice of motion was taken out by the Appellant for restoration of the suit. The Notice of Motion was taken out on 6.2.2004. The case of the

Appellant is that he could not attend the Court on the date of fixed for hearing as his father was ill and bed ridden. His case is that after his father recovered from the illness, on 18.12.2003 he contacted his Advocate. On that day he came to know about the dismissal of the suit. Reliance is placed on a certificate of medical practitioner issued in respect of the sickness of the father of the Appellant.

3. The Notice of Motion was opposed by the Respondent contending that there was no sufficient cause for the Appellant to remain absent on the date fixed for hearing and that there is a gross delay in making application for restoration.

4. The learned trial Judge noted the earlier conduct of the Appellant/Plaintiff as according to him it was also relevant for deciding the Notice of Motion. The learned Trial Judge had held that the illness of the father of the Appellant cannot be a sufficient ground to condone the delay and to restore the suit. The illness of the father could not have prevented the Appellant from attending

the Court. The learned Judge held that the cause which was attempted to be pleaded by the Appellant was manipulated and therefore the learned Judge dismissed the Notice of Motion.

5. Shri Govilkar, learned Counsel appearing for the Appellant submitted that the learned Judge was concerned with the explanation offered by the Appellant for absence on the date on which the suit was dismissed. He submitted that the alleged earlier conduct of the Appellant was not relevant. He submitted that liberal approach ought to have adopted by the Judge while deciding the notice of motion. The learned Counsel for the Respondent submitted that the medical certificate produced by the Appellant was suspicious as it records that the Appellant was asked to take care of his father. He submitted that there was unexplained delay on the part of the Appellant.

6. I have considered the rival submissions. In an application Under Order 9 Rule 9 of the Code of Civil Procedure , 1908 the Appellant/Plaintiff was required to satisfy the Court that he was

prevented by a sufficient cause from remaining present on the date on which the suit was dismissed. The earlier conduct of the Appellant may not be relevant. It is true that even assuming that the father of the Appellant was advised rest from March to December 2003, the Appellant could have contacted his Advocate. But the fact remains that father of the Appellant was sick. In the matter like this, the learned Judge ought to have adopted a liberal approach. The question of condonation of delay and restoration of the suit arises only when there is some default on the part of the litigant. The default could have been condoned by directing payment of cost so that the defendant is compensated. It cannot be said that there was an inordinate delay on the part of the Appellant in applying for restoration. In my view, the suit deserves to be restored by ordering Appellant to pay costs to the Respondent. The amount of costs is quantified at Rs.7500/-the payment of which shall be a condition precedent as the suit was fixed for final hearing when the same was dismissed. The trial Court will have to hear the suit expeditiously.

7. Hence I pass the following order.

i. Impugned Judgment and Order dated 18.6.2004 is quashed and set aside. The S.C.Suit No.5836 of 2000 is restored subject to condition of the Appellant paying sum of Rs.7,500/- by way of costs to the Respondent within a period of four weeks from today. If the amount of costs is not accepted by the Defendant then Appellant will deposit the amount in the trial Court within the stipulated time. If the amount of costs is not paid or deposited within the stipulated time, the impugned order will stand.

ii. If the amount of cost is paid or deposited within the stipulated time, the parties will appear before the learned Trial Judge on 2.5.2005 for fixing the Schedule of hearing. The Appellant will not seek adjournment on any unreasonable ground and will co-operate with the

learned Trial Judge in early disposal of the suit. Hearing of the suit is expedited.

iii. The appeal is allowed in above terms with no orders as to costs.

. Parties and the concerned Court will act on the authenticated copy of this order.

(A.S.Oka, J.)